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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~624~~ 715

THE SOUTHERN EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

ROBERT D. CALDWELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED JANUARY 6, 1873.

Oct. Dec. 1872



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1 UNITED STATES OF AMERICA,
District of West Tennessee, ss:

I, Horace E. Andrews, clerk of the circuit court of the United States for said district of West Tennessee, do hereby certify that the following pages hereto attached are true and perfect copy of the original papers now on file in clerk's office of said court, and of the orders of court made herein, as the same appear of record in said office, together with the original writ and citation, and the returns thereon endorsed.

Witness my hand and the seal of said circuit court this 15th day of November, A. D. 1872.

[SEAL.] HORACE E. ANDREWS, *Clerk.*

Fees for transcript, $18.00.

2 Proceedings in the circuit court of the United States for the sixth circuit and district of West Tennessee, at a regular term of said court, held for its November term, A. D. 1871, at Memphis, in said district, in the following-entitled cause, to wit:

ROBERT D. CALDWELL
vs.
SOUTHERN EXPRESS COMPANY. } No. 928. Case.

The following transcript was filed in said court from the circuit court of Henry Co., Tenn., by defendant:

Transcript.—Filed Apr. 1, 1869.

STATE OF TENNESSEE,
Henry County:

Pleas at a circuit court begun and held for the county of Henry aforesaid, at the court-house in the town of Paris, on the fourth Monday, being the 25th day of January, in the year of our Lord one thousand eight hundred and sixty-nine, and in the 93d year of the Independence of the United States. Present, the Honorable Lucian L. Hawkins, one of the judges of the circuit courts of the State of Tennessee, and assigned to hold the courts of the 13th judicial circuit in said State.

Prosecution bond.

ROBT. D. CALDWELL
vs.
SOUTHERN EXPRESS COMPANY.

3 I acknowledge myself the above plaintiff's security, in the sum of two hundred and fifty dollars, for the prosecution of the above suit with effect, or in case of failure therein to pay all cost that may accrue thereon. Witness my hand and seal this 13th day of January, 1868.

A. MCCAMPBELL.

Original writ.

State of Tennessee to the sheriff of Henry County, greeting:

You are hereby commanded to summon the Southern Express Company personally to appear before the judge of our circuit court at the

next term of said court, to held for the county of Henry, at the court-house in the town of Paris, on the third Monday in January next, to answer R. D. Caldwell of a plea of trespass on the case to his damage four thousand dollars. Fail not, and have you then and there this writ.

Witness, John Anderson, clerk of said court, at office, this third Monday in September, A. D. 1867, and 92nd year of American Independence.

JOHN ANDERSON, *Clerk.*

(Endorsed:) Issued January 13, 1868. John Anderson, clerk.

Came to hand same day issued, and executed by reading and making known the within writ to J. W. Nave, jr., the agent of the Southern Express Co., on 13th January, 1868.

W. WAKELAND, *D. Sheriff.*

Declaration.

The plaintiff sues the defendant for four thousand dollars, as
4 damages for failing to deliver a certain package containing two thousand six hundred and sixty dollars, received by defendant as a common carrier on the 23d of April, 1862, at Jackson, Tennessee, to be delivered to Messrs. Wilson & Young, at New Orleans, La., for a reward then paid said defendant. Plaintiff avers that defendant did not deliver to the said Wilson & Young the said package containing the said sum of money, but has failed so to do; wherefore plaintiff sues defendant by his attorney.

A. McCAMPBELL.

(Endorsed:) Filed 4th day Jan'y, 1868. Jno Anderson, cl'k.

Plea.

The defendants, for plea, say that they did deliver said package of money according to their undertaking, as stated in plaintiff's declaration; and of this they put themselves upon the country.

BROWN & LANNOM,
Att'ys for Def'ts.

The defendants, for further plea, say they did not receive said package and agree to deliver the same, as stated in plaintiff's declaration; and of this they put themselves upon the country.

BROWN & LANNOM,
Atty's for Def'ts.

Notice to take depositions.

PARIS, *Jan'y 1st*, 1869.

U. T. SMYTHE:

5 On the 11th day of Jan'y, 1869, I will, at the office of John J. Irvin, in the town of Jackson, Madison Co., Tenn., take the depositions of Robt. W. Moy, Geo. H. Hughes, and John J. Williams, to be used as evidence in the cause pending in the circuit court of Henry, Tennessee, wherein I am plaintiff and the Southern Express Co. is defendant.

R. D. CALDWELL.

(Endorsed:) I delivered a true copy of the within to U. S. Smythe, Jan'y 1, 1869.

T. O. BARBEE, *C't C.*

Plaintiff's proof.

Depositions of George G. Hughes & John J. Williams, witnesses for the plaintiff in the above cause, taken, upon notice, on the 11th day of Jan'y, 1869, at the office of John Irwin, in Jackson, Tenn., in the presence of the plaintiff's counsel, after being duly sworn, deposed, as follows:

GEO. G. HUGHES, first examined.

Int. 1. Are you acquainted with H. W. Wyncoop, and how long have you known him?

Ans. About six years. I have been acquainted with him for that time.

Int. 2. State whether or not he was acting as the agent of the Southern Express Co. at Jackson, Tenn., in April, 1862.

Ans. I don't remember whether he was acting as agent of So. Expr. Co. or not, but he was living in Jackson, at Mobile & Ohio depot, at that time.

Int. 3. State whether or not you ever saw him write or have received any letters from him.

6 Ans. I have seen him write often and have corresponded with him.

Int. 4. State whether or not you are acquainted with his handwriting?

Ans. I think that I would know it.

Int. 5. Please examine the receipt here filed as Exhibit A, and made a part of this question, and state whether or not the written part of the same and the signature to said receipt is in the handwriting of H. W. Wyncoop.

Ans. I believe all the written part of the receipt and the signature there to be said Wyncoop's. And further deponent saith not.

GEO. G. HUGHES.

Exhibit A in above deposition.

Southern Express Company, (of Georgia,) successor to Adams Express Co. Received of R. D. Caldwell one package, sealed and said to contain two thousand one hundred and sixty dollars, addressed Messrs. Wilson & Young, New Orleans, La., to be forwarded as addressed.

It is agreed and is part of the consideration of this contract that the Southern Express Company is not to be held responsible except as forwarders, nor for any loss or damage arising from the danger of railroad, ocean, steam, or river navigation, fire, &c., unless specially insured and specified in this receipt, and in no event to be held re-

7 sponsible for safe transportation of the articles herein *herein* receipted for after the same shall have been delivered to other parties, which the Southern Express is hereby authorized to do, for completing the transportation or delivery, nor is it to be liable for any loss or damage whatever unless claim be made therefor within ninety days from its delivery to it.

For the proprietors:

WYNCOOP.

Endorsed (in pencil:) "Presented to office, N. O., 29th Oct. 1, '66, by E. H. Wilson from R. D. Caldwell."

J. J. WILLIAMS next examined for pl'ff.

Int. 1. State if you are acquainted with W. H. Wyncoop; if so, how long have you known him?

Ans. I am, and have known him six or seven years.

Int. 2. State whether or not said H. W. Wyncoop was the agent of the Southern Express Company in Jackson, Tenn., in April, 1862?

Ans. He was agent of said company, as well as my memory serves me, for about one year, ending about the middle of May, 1862.

Int. 3. State whether or not you ever had any correspondence with said Wyncoop, or ever saw him write.

Ans. I have seen him write often; he was acting as telegraph-operator at the same time, and I received quite a number of de'patches in his handwriting.

Int. 4. State whether or not you are acquainted with handwriting of said H. W. Wyncoop.

Ans. I think I am.

8 Int. 5. Examine the receipt filed herein as Exhibit A, to the 5th question put Geo. G. Hughes, and state whether or not the written part of the same and the signature thereto is in the handwriting of said Wyncoop.

Ans. I believe it is. And further deponent saith not.

J. J. WILLIAMS.

ROBERT W. MAY next examined for plaintiff.

Int. 1. State if you are personally acquainted with H. W. Wyncoop; if so, how long have you known him?

Ans. I am, and have known him six or seven years.

Int. 2. State whether or not said H. W. Wyncoop was agent of the Southern Express Company in April, 1862, at Jackson, Tenn?

Ans. I do not know.

Int. 3 State whether or not you ever had any correspondence with said Wyncoop or ever saw him write.

Ans. I have had correspondence with him and seen him write.

Int. 4. State whether or not you are acquainted with his handwriting.

Ans. I think I am.

Int. 5. Please examine the receipt herein filed as Exhibit A, to the 5th question put to G. G. Hughes, in this deposition and state whether or not the written part of the same is in the handwriting of said Wyncoop, and whether the signature in said receipt is said Wyncoop's.

9 Ans. I believe the written part and signature is his handwriting. Further this deponent saith not.

R. W. MAY.

The foregoing depositions were taken before me, as stated in the caption, and reduced to writing by the witnesses and by Jno. L. H. Tomlin, plaintiff's attorney; and I certify that I am not interested in the cause nor of kin or counsel to either of the parties, and that I sealed them up and put them in the post-office without being out of my possession or altered after they were taken.

Given under my hand the 11th day of January, 1869.

JOHN IRVIN, *J. P.*

Affidavit.

H. B. PLANT, being duly sworn according to law, deposes and says that he is the president of the Southern Express Company, the defend-

ant in the above-entitled cause, and that said company is an incorporated company, under and by virtue of the laws of the State of Georgia, and is a resident and citizen of that State, and that the matter in dispute in said cause exceeds the sum of five hundred dollars, exclusive of costs, and that he has reason to and does believe that from prejudice or local influence the defendant will not be able to obtain justice in said State court.

H. B. PLANT.

Sworn to before me this 24th July, 1868.

[L. S.] JNO. TONGEN,
Clerk Shelby County Court, Tennessee.

[5-c. I. R, st'p.]

10 *Defendant's petition.*

To the Honorable Lucien Hawkins, judge of the circuit court of Henry County, Tennessee, sitting at Paris:

Your petitioner, the Southern Express Company, a citizen of the State of Georgia, respectfully shows to the court that on the 13th day of January, 1868, the defendant, R. D. Caldwell, caused a summons to issue from the clerk's office of your honorable court against your petitioner, which was placed in the hands of M. Wakeland, a deputy sheriff of this county, and on the same day by him executed on J. W. Nance, jr., and agent of your petitioner, and afterwards, to wit, at the January term, 1869, of your honorable court said defendant Caldwell filed his declaration wherein he sues your petitioner for an alleged failure to deliver a certain package which he charges in said declaration contained the sum of two thousand one hundred and sixty dollars, which he further avers was delivered to petitioner as a common carrier on the 23d day of April, 1862, at Jackson, Tennessee, to be delivered to Messrs. Wilson & Young at New Orleans, and lays his damages at the sum of four thousand dollars, and that said suit so instituted is now pending in your honorable court. Your petitioner, the Southern Express Company, would further show unto your honor that it is an incorporated company under and by virtue of the laws of the State of Georgia, and is a resident and

11 citizen of that State; that petitioner is ready and able to give good and sufficient surety for his entering in the circuit court of the United States to be holden in the city of Memphis for the district of West Tennessee, on the first day of its next session, copies of all proceedings in said cause, and in all other respects to comply with and perform all orders made in the premises, either by this court or said circuit court of the United States. Wherefore petitioner prays for the removal of the above-described suit from your honorable court unto the next circuit court of the United States to be held for said district at Memphis, on the day of , 1869, and for such other orders as may be proper according to law; and as in duty bound your petitioner will ever pray, &c.

BROWN & LANNOM,
Att'ys for Petitioner.

(Endorsed:) Filed Jan'y 29, 1869. John Anderson, c'k.

Order.

FRIDAY, *January 29th*, 1869.

Came the parties by their attorney; whereupon, on motion of defendant, and it appearing to the satisfaction of the court, from defendant's petition and affidavit filed, that defendant is a non-resident of the State of Tennessee, it is considered by the court that this cause be removed into the circuit court of the United States for the district of West Ten-
12 nessee to be held in the city of Memphis, upon defendant's executing bond, with sufficient sureties in the sum of five hundred dollars, conditioned that he will enter in said court on the first day of its next session copies of all process, pleadings, testimony, and other proceedings in this case.

Order.

FRIDAY, *February 1st*, 1869.

Came the parties by attorney; whereupon the plaintiff objects to the filing of the bond for the removal of this cause to the Federal court, upon the ground that said bond was not acknowledged before this court, or any officer thereof, and not approved by any officer of this court; which is overruled by the court; to which ruling of the court the plaintiff excepts.

Bond.

We, the Southern Express Company as principal, and C. P. Anderson as surety, bind ourselves to R. P. Caldwell, in the sum of one thousand dollars.

The condition of this obligation is such that whereas the said company has applied, under the act of Congress of the United States of March 2, 1867, to have a certain suit at law now pending in the circuit court of Henry County, in the State of Tennessee, transferred to the circuit court of the United States for the district of West Tennessee, in accordance with the said law, in which suit the said Caldwell is
13 plaintiff and the said company is defendant.

Now, in case the said company shall enter in the said United States court, by the first day of its next term, copies of all process, pleadings, depositions, testimony, and other proceedings in the said suit, and do all such other appropriate acts as are by law required upon the removal of the said cause into said court, then the obligation to be void; otherwise to remain in full force.

SOUTHERN EXPRESS COMPANY,
By C. L. LOOP, *Cash'r.*
C. P. MORRIS, *V.-Pr. First Nat. B'nk of Memphis.*

The above bond is a good and sufficient one.

BENJ. COLEMAN, [L. S.]
D. C. & M. Chancery Court of Memphis.

JAN'Y 27, 1869.

Certificate.

I, John Anderson, clerk of the circuit court at Paris, in and for the county of Henry and State of Tennessee, do certify that the foregoing pages contain a full, true, perfect and complete transcript of the

record in the above-recited cause in said court, as is on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at office at Paris, this the 22nd day of March, 1869.

[L. S.] JOHN ANDERSON.

14 *Notice to take deposition.—Serv'd Apr. 5, 1869.*

W. T. SMYTHE, *Agent South. Express Co.:*

You will take notice that on Saturday, the 17th day of April, 1869, at the office of the clerk and master of the chancery court, in the town of Paris, Henry County, Tennessee, I will take the deposition of O. V. Young, to be used as evidence on behalf of plaintiff, in the cause pending in the circuit court of the United States, at the city of Memphis, for the district of West Tennessee, wherein I am plaintiff and the Southern Express Company is defendant. You may attend and cross-examine, if you think proper.

R. D. CALDWELL.

(Endorsed:) Delivered a copy of this notice to W. T. Smythe, the 5th day of April, 1869.

G. W. MOORE, *D. S. H.*

Young's deposition.—Taken Apr. 17, 1869.

Deposition of O. V. Young, a witness for plaintiff in the above case, taken upon notice, on the 17th day of April, 1869, at the office of the clerk & master of the chancery court of Henry County, in the town of Paris, Tennessee, in the presence of plaintiff and Andrew McCampbell, his counsel, and W. D. Lannom, counsel for the def't.

O. F. YOUNG, aged 44 years and duly sworn, deposed as follows:

Direct int. 1. Who composed the firm of Wilson & Young, in the city of New Orleans, on the 23d of April, 1862?

15 Ans. E. H. Wilson and O. F. Young, the defen'ent.

Int. 2. Were you in the city of New Orleans on the 23d of April, 1862?

Ans. I was. I left the city on the 24th of April, 1862.

Int. 3. Did your house at that time or subsequently receive a package of money from R. D. Caldwell, of Henry County, Tennessee, containing $2,160?

Ans. We did not at that date or after it. We did receive money from him some time previous to that date.

Cross-int. 1. You left the city of New Orleans on April 24, 1862. When did you return to the city?

Ans. In the latter part of the year 1864 or first of 1865.

Cross-int. 2. Where were you during that interim?

Ans. I was in Mississippi, Georgia, Tennessee, and Kentucky, each a portion of the time.

Cross-int. 3. Do you of your own knowledge know what the house of Wilson & Young received after you left there in 1862 until you returned in 1864 or 1865?

Ans. I do not, except what appeared upon the books on my return. And further deponent saith not.

O. F. YOUNG.

STATE OF TENNESSEE, *Henry County:*

I, Isaac M. Hudson, clerk and master of the chancery court of the county and State aforesaid, do certify that the foregoing deposition
16 was taken before me as stated in the caption, and reduced to writing by me, and signed by the witness in my presence; and I certify that I am not interested in the cause, nor of kin or counsel to either of the parties; that I sealed them up and put them in the post-office at Paris, Tennessee, without being out of my possession or altered after they were taken.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at office in Paris, this the 17th day of April, A. D. 1869.

[L. S.] I. M. HUDSON, *C. & M.*

Plea of defendant.—Filed July 7, 1869.

And now on this day comes the defendant, the Southern Express Company, and defends the wrong and injury, when, &c., and for additional plea herein by leave of the court first had and obtained says, that it is not guilty in manner and form as in the said declaration alleged. And of this it puts itself upon the country.

HUTCHINSON & TOWNSEND,
Attorneys for Defendant.

Similiter of plaintiff.—Filed July 7, 1869.

And the plaintiff, R. D. Caldwell, for similiter to the first, second, and third pleas by the said defendant, the Southern Express Company, pleaded as above, doth the like.

WRIGHT, McKISICK & WRIGHT,
Attorneys for Plaintiff.

17 *Order entered, Jan'y* 6, 1870.

On motion of defendant's attorney leave is given him to file an additional plea herein, which was done, and thereupon plaintiff filed a demurrer to said plea, and defendant filed a joinder in demurrer.

Additional plea.—Filed Jan'y 20, 1870. *Refiled Oct.* 13, 1871.

18 Comes the defendant, and for a further and additional plea herein by leave of the court first had and obtained, says actio non, because it says that when the said supposed package in the said declaration described was delivered to the defendant, for the purpose of being transported and delivered as in the said declaration alleged, it was then and there agreed between the said plaintiff and the said company, and it was made one of the express conditions upon which the said package was received, that the said company, defendant, should not be held liable for any loss of or damage to the said package whatever, unless claim should be made therefor within ninety days from its delivery to said company. And defendant avers that the said package was taken from its possession and custody, and was destroyed or lost, on the day of , 1862, by reason whereof the said loss and damage then accrued to the said plaintiff, as by him in his said declaration alleged, and of which he then and there had notice. And defendant avers that no claim was made for any such loss or damage upon defendant, or any of its agents, by the said plaintiff, until the bringing of this suit, to wit, on

the day of January, 1868, more than the period of the said
19 ninety days within which the said claim was to have been made, as aforesaid. And so defendant says that the said plaintiff has therein wholly failed to comply with the said express condition upon which defendant was to be held liable for any loss of or damage to the said package as aforesaid. And this it is ready to verify.

HUTCHINSON & TOWNSEND,
Attorneys for Defendant.

Demurrer.—Filed Jan'y 20, 1870.

And the said plaintiff demurs to the above plea, and, for cause of demurrer, shows that, by the said plea, the said defendant attempts to evade the responsibility by an illegal stipulation which the policy of the law does not allow; and also because the plea does not deny that said package of money was taken from defendant by reason of the gross negligence of its agents.

WRIGHT, McKISICK & WRIGHT,
Attorneys for Plaintiff.

Joinder in demurrer.—Filed Jan'y 20, 1870.

And the defendant comes and joins in the said demurrer.

HUTCHINSON & TOWNSEND,
Attorneys for Defendant.

20 *Order entered.—April* 25, 1871.

On motion of the plaintiff, and it appearing to the court that this cause was commenced in the State court under the code of practice in the State, and that the cause was removed into this court by the defendant, in the May term, 1869, the plaintiff has leave to file his declaration herein now for then, which is accordingly done.

Declaration.—Filed Apr. 25, 1871.

Robert D. Caldwell, a citizen of the State of Tennessee, complains, by attorney, of the Southern Express Company, a corporation by virtue of the laws of the State of Georgia, which was impleaded in the Henry County circuit court, and which action the said defendant caused to be removed into this court under and by virtue of the acts of Congress, of a plea of trespass on the case on promises:

For that whereas the said defendant, before and at the time of making its said promise and undertaking hereinafter next mentioned, was a common carrier of goods, chattels, monies, and other valuables for hire in and by certain railway-carriages from a certain place, to wit, Jackson, Tennessee, to wit, in the district of West Tennessee, to a certain other
place, to wit, the city of New Orleans, in the State of Louisiana,
21 to wit, the district of Louisiana. And the said defendant, being such carrier as aforesaid, the said plaintiff heretofore, to wit, on the 23d day of April, 1862, at Jackson, Tennessee, to wit, the district aforesaid, at the special instance and request of the said defendant, caused to be delivered to the said defendant so being such carrier as aforesaid, at Jackson, to wit, the district aforesaid, a certain large sum of money, to wit, the sum of two thousand one hundred and sixty dol-

lars, of great value, to wit, of the value of $2,160.00, to be taken care of and safely and securely carried and conveyed by the said defendant as such carrier as aforesaid, in and by the said railway-carriages from Jackson, Tennessee, aforesaid, to New Orleans, aforesaid, and there, to wit, at New Orleans, aforesaid, to be safely and securely delivered by the said defendant for the said plaintiff to Messrs. Wilson & Young; and, in consideration thereof, and of certain reward to the said defendant in that behalf, it, the said defendant, being such carrier, as aforesaid, then and there, to wit, on the day and year aforesaid, at &c., as aforesaid, undertook and faithfully promised the said plaintiff to take care of the said money, and safely and securely to convey and carry the same in and by the said railway-carriages from &c., aforesaid, to
22 &c., aforesaid, and there, to wit, New Orleans, aforesaid, safely and securely to deliver the same for the said plaintiff. And although the said defendant, as such carrier as aforesaid, then and there had and received the said money for the purpose aforesaid, yet the said defendant, not regarding its duty as such carrier, nor its said promise and undertaking so made as aforesaid, but contriving and fraudulently intending craftily and subtly to deceive and injure the said plaintiff in this behalf, hath not taken care of the said money, or safely or securely conveyed and carried the same from Jackson, Tenn., aforesaid, to New Orleans, aforesaid, nor there to said Messrs. Wilson & Young, at New Orleans aforesaid, safely or securely delivered the same for the said plaintiff, but, on the contrary thereof, it, the said defendant, being such carrier, as aforesaid, so carelessly and negligently behaved and conducted itself with respect to the $2,160.00 in money aforesaid, that, by and through the mere carelessness and negligence and improper conduct of the said defendant, its servants and agents in this behalf, the said $2,160, in money aforesaid, of the value aforesaid, afterwards, to wit, the day and year aforesaid, at, to wit, the district aforesaid, became, and was, wholly lost to the said plaintiff, to wit, at, &c., aforesaid.

23 2nd count.—And, whereas, also the said defendant, afterwards, to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, accounted with the said plaintiff of and concerning divers other sums of money from the said defendant to the said plaintiff, before that time due and owing and then in arrear and unpaid and upon such accounting the said defendant was found then and there to be in arrear and indebted to the said plaintiff in the further sum of two thousand one hundred and sixty dollars and being so found in arrear and indebted, the said defendant, undertook and then and there faithfully promised in consideration thereof to pay to the said plaintiff the said last-mentioned sum of money when the said defendant should be thereunto afterwards requested.

3d count.—And, whereas, also, the said defendant, afterwards, to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, was indebted to the said plaintiff in the further sum of two thousand one hundred and sixty dollars, for so much money by the said defendant, before that time, had and received to and for the use of the said plaintiff, and being so indebted, it, the said defendant, in consideration
24 thereof, afterwards, to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the last-mentioned sum of money, when it, the said defendant, should be thereunto afterwards required. Nevertheless the said defendant, not regarding its said several promises and undertakings, but contriving and fraudulently intend-

ing craftily and subtly to deceive and defraud the said plaintiff in this behalf, hath not as yet paid the said several sums of money, or any or either of them, or any part thereof, to the said plaintiff, although often requested so to do; but the said defendant, to pay the same hath hitherto wholly neglected and refused and still doth neglect and refuse, to the damage of him, the said plaintiff, four thousand dollars, and therefore he sues.

McKISICK,
For Plaintiff.

Order entered.—Jan'y 2, 1872.

Came the parties by their attorneys, and came also a jury of good and lawful men, to wit, I. E. Merriman, W. T. Pruitt, A. H. Merrill, P. A. LeFerm, T. S. Barbour, T. T. Wright, George W. Smith, James Warner, C. B. Chamness, J. R. Stebbins, John Nail, and P. H. Johnson, who being elected, tried, and sworn well and truly to try the issues joined between the plaintiff and *and* defendant, on their oaths say that they find said issues in favor of the plaintiff, by reason of the premises alleged in the declaration, and assess his damages at three thousand four hundred and twenty-three dollars and sixty cents.

It is therefore considered by the court that the plaintiff have and recover of the defendant thirty-four hundred and twenty-three dollars and sixty cents, the damages as by the jury assessed, and the costs of this suit, and that execution issue therefor.

Bill of exceptions.

Be it remembered, that on the 2nd day of January, 1872, that being one of the days of the November term of the United States circuit court for the district of West Tennessee, this cause came on to be argued, upon the demurrer of the plaintiff, to the further and additional plea of the defendant, setting up the limitation by contract of the time for demand for any damage or loss, &c., and, the same being fully considered, is by the court allowed; to which opinion and ruling of the court the defendant at the time excepted, and asked for time to prepare and offer his bill of exceptions thereto, which was accordingly granted.

26 And thereupon the said cause came on to be tried before a jury.

And thereupon the plaintiff introduced and read to the jury the transcript in this cause from the Henry County circuit court in words and figures following, (as in former part of this transcript inserted.)

Plaintiff then introduced and read to the jury the deposition of O. V. Young, in the words and figures following. (Vide Young's deposition hereinbefore inserted.)

Plaintiff then introduced as a witness one Caufman, who testified as follows:

"Some time in the month of April, 1862, I carried for the plaintiff, from his house, a package from Jackson, Tennessee, to be put in the express office there. Said package was directed to New Orleans. I carried the package, as directed, to Jackson, and there delivered it to the express agent and took his receipt for the same. I believe it is the same receipt which I have heard read from the transcript from Henry County circuit court. I do not remember what was in the package but do remember the receipt was satisfactory to me at the time. I do not now remember what indorsements there were upon the package. When I took the receipt I either read it myself or heard it read, I do

27 not know which. I carried the receipt back and gave it to the plaintiff; he lives about 13 miles north of Paris, Tennessee, and I lived and still live within 2½ miles of him. I don't know how far it is from Jackson. I know it took me more than a day—about a day and a half—to go to Jackson."

And this being all the evidence, the court instructed the jury as follows:

"You must look to all the evidence, and if you find from the receipt given in evidence and from the other evidence given in the cause that the package of money was received by the defendant and was lost by it, and not accounted for by it, you must find for the plaintiff; to which charge of the court no objection was made.

And now, on this day of January, 1872, being a subsequent day of said term of the said court, came the defendant and moved for a new trial in the aforesaid, because the verdict of the jury therein is without evidence to support it, and because the said verdict is contrary to the evidence; which said motion was by the court overruled; to which, opinion and ruling of the court the defendant excepts.

And now, on this the same day of said term, and at the same
28 time with the overruling of his said motion, the said defendant, in open court, presents this his bill of exceptions, as well to the action of the court in overruling and refusing his said motion as to its opinion and decision in sustaining the demurrer to its said plea, and asks that this its bill of exceptions may be signed, sealed, and enrolled and made a part of the records in this cause, which is done accordingly.

CONNALLY F. TRIGG, [SEAL.]
U. S. District Judge.

Order entered Jan'y 4, 1872.

It appearing that the clerk has failed to make any entry in this cause, showing the disposition of plaintiff's demurrer, to the further and additional plea of the defendant, wherein he sets up limitation of time by contract, &c. It is therefore ordered that the judgement herein be so amended as to show that before the jury were sworn the said demurrer after argument was sustained, and the said plea ordered to be held for nought; and it is ordered that this entry be taken as such amendment and that the judgment aforesaid be held as though made according to the judgment of the court, sustaining the demurrer, and so stand
29 corrected. And thereupon came the defendant and presented to the court here its bill of exceptions to the rulings, decisions, and actions herein, and prayed that the same be signed, sealed, and enrolled as a part of the records herein, which is done accordingly.

Order entered Jan'y 6, 1872.

Came the Southern Express Company, plaintiff in the writ of error filed herein, and filed its supersedeas bond, with F. S. Davis as its surety, endorsed "approved", as by law required.

Supersedeas bond, filed Jan'y 6, 1872.

Supreme Court of the United States.

Know all men by these presents, that we, the Southern Express Company and F. S. Davis, are held and firmly bound unto Robert D.

Caldwell, of Tennessee, in the sum of sixty-eight hundred dollars, to be paid to the said Caldwell, his executors and administrators, to which payment, well and and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 6th day of January, 1872.

Whereas the above-named Express Company, hath prosecuted a
30 writ of error to the Supreme Court of the United States, to reverse a judgment rendered by the circuit court of the United States for the district of West Tennessee, in an action wherein the said Caldwell was plaintiff, and the said Express Company was defendant:

Now, therefore, the condition is such that if the above-named Southern Express Company shall prosecute its said writ of error with effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE SOUTHERN EXPRESS COMPANY, [SEAL.]
By HUTCHINSON, & TOWNSENT, *its Attorneys.*
F. S. DAVIS. [SEAL.]

Approved.

CONNALLY F. TRIGG,
U. S. District Judge.

31 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the judges of the circuit court of the United States for the district of West Tennessee, greeting:

Because, in the records and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court before you, between Robert D. Caldwell and the Southern Express Company, a manifest error hath happened, to the great damage of the said Southern Express Company, as by its complaint appears; We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same
32 at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 1st Monday of December, in the year of our Lord one thousand eight hundred and seventy-one.

HORACE E. ANDREWS,
Clerk United States Circuit Court, District West Tenn.

33 (Indorsed:) 928. Robert D. Caldwell ads. The Southern Express Company. Original writ of error.

Filed as the original writ of error in the above cause, January 4th, 1872, and copy of same left for defendant in this writ same day.

HORACE E. ANDREWS,
Clerk Circuit Court of the United States for the District of West Tenn.

34 UNITED STATES OF AMERICA, *ss:*

To ROBERT D. CALDWELL, greeting.

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be held at Washington, on the first Monday of December, A. D. 1872, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of West Tennessee, wherein the Southern Express Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this the first Monday in December, in the year of our Lord one thousand eight hundred and seventy-one.

CONNALLY F. TRIGG,
U. S. District Judge.

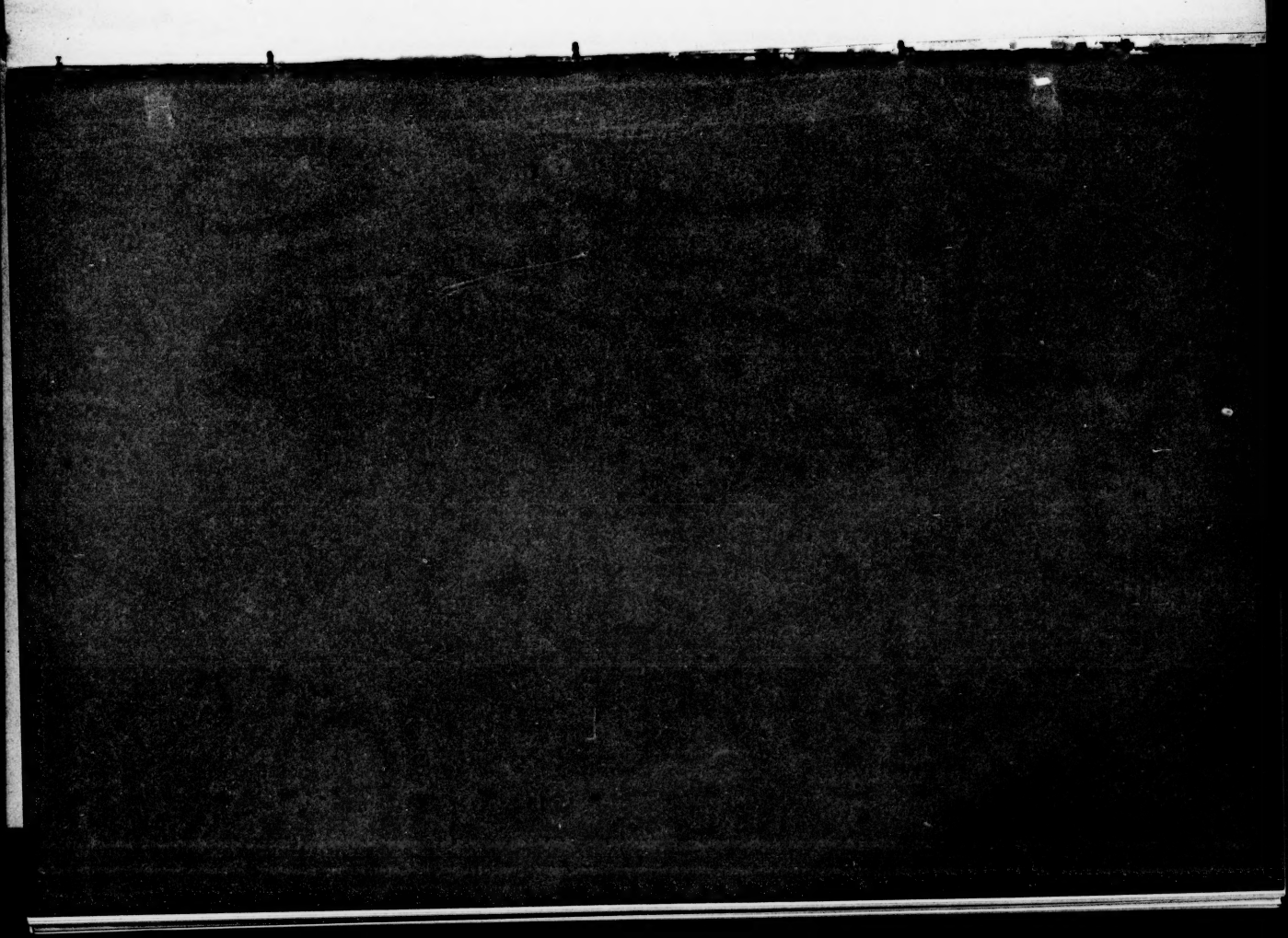
35 (Indorsed:) E. 118. 928. Robert D. Caldwell ads. The Southern Express Company. Citation.

Executed by delivering copies of this citation to Archibald Wright and L. D. McKisick, att'ys, this 2nd day of Oct., 1872.

L. B. EATON,
U. S. Marshal.
L. T. ATLEE, *Deputy.*

Ser., 4.00; copies, 1.00; mil., .24—$5.24.

(Indorsement on cover:) No. 624. The Southern Express Company, plaintiff in error, vs. Robert D. Caldwell. W. Tennessee, C. C. U. S. Filed 6th January, 1873.



UNITED STATES SUPREME COURT.

THE SOUTHERN EXPRESS CO.,

Plaintiff in Error,

vs.

ROBERT D. CALDWELL,

Defendant in Error.

Brief for Plaintiff in Error.

C. A. SEWARD,

Of Counsel for Plaintiff in Error.

New York:
Davis & Corson, Printers, 39 Nassau Street.
1874.

United States Supreme Court.

THE SOUTHERN EXPRESS COMPANY,
Plaintiff in Error,

vs.

ROBERT D. CALDWELL,
Defendant in Error.

Brief for the Plaintiff in Error.

STATEMENT OF THE CASE.

This action was brought by Robert D. Caldwell in January, 1868, in the Circuit Court of Henry County in the State of Tennessee, against the Southern Express Co., a corporation organized under the laws of the State of Georgia, for the loss of a certain package of money containing $2,660 entrusted to it, on the 23d of April, 1862, for transportation and delivery to Messrs. Wilson & Young at New Orleans (fol. 4 of Record).

The Express Company filed its plea, substantially of the general issue. Testimony was thereupon taken, but prior to the trial of the cause, the Express Company filed its petition under the Act of Congress approved March 2, 1867, for the removal of the cause to the Circuit Court of the United States, for the District of West Tennessee; and such proceedings were thereupon had on such petition, that the suit was so removed to said Circuit Court of the United States (fol. 10–14 of Record.)

Thereafter, by leave of the Court, the plaintiff filed his declaration in the said Circuit Court of the United States, so as to conform the pleadings to the practice in Federal Courts (fol. 20 of Record).

Such declaration is the ordinary one against a carrier on his common law liability, for the package in question; and also contains the common counts of *In simul computassent* and *Indebitatus assumpsit.*

After such removal to the Circuit Court of the United States, the Express Company filed its plea to the general issue, and by leave of the Court first had and obtained, filed an additional special plea in bar (fol. 18 of Record) as follows:

> "Comes the defendant, and for a further and additional plea herein, by leave of the court first had and obtained, says *actio non*, because it says that when the said supposed package in the said declaration described was delivered to the defendant for the purpose of being transported and delivered, as in the said declaration alleged, it was then and there agreed between the said plaintiff and the said company, and it was made one of the express conditions upon which the said package was received, that the said company defendant should not be held liable for any loss of or damage to the said package whatever, unless claim should be made therefor within ninety days from its delivery to said company. And defendant avers that the said package was taken from its possession and custody, and was destroyed or lost on the day of 1862, by reason whereof the said loss and damage then accrued to the said plaintiff, as by him in his said declaration alleged, and of which he then and there had notice. And defendant avers that no claim was made for any such loss or damage upon defendant or any of its agents by the said plaintiff until the bringing of this suit, to wit on the day of January, 1868, more than the period of the said ninety days within which said claim was to have been made as aforesaid. And so defendant says that the said plaintiff has therein wholly failed to comply with the

said express condition upon which defendant was to be held liable for any loss of or damage to the said package as aforesaid."

To such special plea the plaintiff demurred (fol. 19 of Record), and for cause of demurrer, shows:

> "That by said plea the said defendant attempts to evade the responsibility by an illegal stipulation which the policy of the law does not allow; and also because the plea does not deny that said package of money was taken from defendant by reason of the gross negligence of its agents."

The defendant joined in the demurrer (fol. 19 of Record).

The Circuit Court of the United States sustained the demurrer to said plea, and ordered the plea to be held for naught (fol. 28 of Record), to which decision the defendant company duly excepted.

And thereupon the issues of fact, so framed on the declaration and plea to the general issue, were tried. On such trial the plaintiff read in evidence the testimony which had been taken on his behalf in the State Court before removal (fol. 26 and 5 and 9 of Record). In such evidence was set forth the Bill of Lading or Express receipt delivered by the Express Company to the shipper at the time of the receipt of the package in question. Such Express receipt is in the words following, to wit:

> "Southern Express Company (of Georgia), successor to Adams Express Co.,
>
> Received of R. D. Caldwell one package sealed and said to contain two thousand one hundred and sixty dollars, addressed Messrs. Wilson & Young, New Orleans, La., to be forwarded as addressed.
>
> It is agreed and is part of the consideration of this contract that the Southern Express Company is not to be held responsible except as forward-

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> "Comes the defendant, and for a further and additional plea herein, by leave of the court first had and obtained, says *actio non*, because it says that when the said supposed package in the said declaration described was delivered to the defendant for the purpose of being transported and delivered, as in the said declaration alleged, it was then and there agreed between the said plaintiff and the said company, and it was made one of the express conditions upon which the said package was received, that the said company defendant should not be held liable for any loss of or damage to the said package whatever, unless claim should be made therefor within ninety days from its delivery to said company. And defendant avers that the said package was taken from its possession and custody, and was destroyed or lost on the day of 1862, by reason whereof the said loss and damage then accrued to the said plaintiff, as by him in his said declaration alleged, and of which he then and there had notice. And defendant avers that no claim was made for any such loss or damage upon defendant or any of its agents by the said plaintiff until the bringing of this suit, to wit on the day of January, 1868, more than the period of the said ninety days within which said claim was to have been made as aforesaid. And so defendant says that the said plaintiff has therein wholly failed to comply with the

and express condition upon which defendant was to be held liable for any loss of or damage to the said package as aforesaid."

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>
> It is agreed and is part of the consideration of this contract that the Southern Express Company is not to be held responsible except as forward-

ers, nor for any loss or damage arising from the danger of railroad, ocean, steam, or river navigation, fire, etc., unless specially insured and specified in this receipt, and in no event to be held responsible for safe transportation of the articles herein *herein* receipted for, after the same shall have been delivered to either parties, which the Southern Express is hereby authorized to do for completing the transportation or delivery; *nor is it to be liable for any loss or damage whatever, unless claim be made therefor within ninety days from its delivery to it.*

For the proprietors,

WYNCOOP."

(fols. 6 and 7 of Record.)

The plaintiff then read in evidence the deposition of O. V. Young, taken in the United States Circuit Court after the removal of this cause thereto, which, in substance, was (fol. 15 of Record) that he was a member of the firm of Wilson & Young, and that they had not received the package in question.

It appeared, however, on his cross-examination, that he left New Orleans on the 24th day of April, 1862—the day after the shipment of the package at Jackson, Tennessee—and did not return to New Orleans until the latter part of the year 1864 or the beginning of 1865, and that his only knowledge of the fact that his firm had not received it was derived from the receipt of such package not appearing on the books of his firm (fol. 15 of Record).

The plaintiff then proved by one Caufman (fol. 26 of Record) that, in the month of April, 1862, he delivered the package in question to the Express Company at Jackson, Tennessee, and that he took a receipt for the same. The witness further testified "The receipt was satisfactory to me at the time. * * * When I took the receipt I either read it myself or heard it read, I do not know which. I carried the receipt back and gave it to the plaintiff."

This was all the evidence introduced on the trial.

Thereupon, under the charge of the Court, the jury found a verdict for the plaintiff for the full amount claimed.

On the subsequent day of the term at which this cause was tried, and before the entry of judgment, the defendant moved for a new trial "because the verdict of the jury therein is without evidence to support it, and because the said verdict is contrary to the evidence" (fol. 27 of Record).

The Court overruled the motion, to which ruling the defendant excepted.

Thereupon the defendant tendered his bill of exceptions, which was duly signed and sealed by the Court (fol. 28 of Record), and thereafter duly sued out its Writ of Error to this Court.

Assignment of Errors.

The plaintiff in error respectfully insists that the Court below erred in the following:

1. In that it sustained the demurrer of the plaintiff to the special plea of the defendant in the foregoing statement set forth. Whereas, it should have overruled the demurrer to said plea, and sustained said plea.

2. In that it denied the defendant's motion for a new trial, for that the verdict of the Jury was without evidence to support it, and for that the said verdict was contrary to the evidence.

Both these errors are properly reviewable by this Court by a Writ of Error; for it is well settled that, on a Writ of Error to a Circuit Court of the United States, the transcript of the record of all the proceedings in the case is brought before this Court, and is open to the inspection, consideration, and revision of this Court.

United States Bank *v.* Smith, 11 Wheaton, 171-173.
Dred Scott *v.* Sandford, 19 How., 393.

POINT I.

AS TO THE FIRST ASSIGNMENT OF ERROR:

The special plea substantially averred that at the time of the delivery to, and receipt by, the plaintiff in error of the package in question, a special contract was entered into between the parties, and that it was one of the express conditions of such special contract that (fol. 18 of Record) "the said Company defendant should not be held liable for any loss of or damage to the said package whatever, unless claim should be made therefor within ninety days from its delivery to said Company." The plea then further avers that said package was either lost or destroyed on the " day of , 1862; by reason whereof the said loss and damage then accrued to the said plaintiff, as by him in his said declaration alleged, and of which he then and there had notice."

It further avers "that no claim was made for any such loss or damage upon the defendants, or any of its agents, by the said plaintiff, until the bringing of this suit, to wit, on the day of January, 1868, more than the period of the said ninety days within which the said claim was to have been made as aforesaid."

To this the defendant in error demurred, alleging, in substance, that by said plea "the said defendant attempts to evade the responsibility by an illegal stipulation which the policy of the law does not allow."

By such demurrer the following facts are deemed to be conceded, viz:

1. That a contract was made between the parties at the time of the shipment of the package in question, containing the conditions set up in the special plea.

2. That no claim for the loss or damage of such package was made upon the defendant or any of its agents by the said plaintiff, until long after the expiration of the ninety days provided in said contract.

The question therefore to be considered *in limine* is: Is the condition in said contract contained a valid and binding one, and one which the Courts will enforce?

The Statutes of Limitations enacted by the sovereign power of the State are statutes of peace. They are founded on the maxims, "*Vigilantibus non dormientibus jura subveniunt*," and "*Interest reipublicæ ut sit finis litium.*"

They enter into and form part of every contract or agreement between parties, save when the parties have, by agreement, created for themselves what may be termed a private Statute of Limitations.

The right of persons to fix by contract a certain and definite time in which to enforce the same, one against the other, rests on the maxim "*Modus et conventio vincunt legem*"; that is to say, if, for example, under the general Statute of Limitations enacted by the sovereign power, one year be the limit in which a suit for the infringement of a given contract can be brought, parties capable of contracting may in their contract provide for a lesser or a greater length of time for the enforcement, as between themselves, of such contract. The above maxim is subject only to this restriction, to wit: "*Facta privata jure publico derogare non possunt*"; *i. e.*, the consent or private agreement of individuals cannot make valid that which is in contravention of the law.

Broom's Legal Maxims, p. 303, *et seq.*

The condition contained in the Express receipt cannot be said to be in contravention of law, for similar conditions in other contracts have met with judicial sanction.

a. Conditions in policies of fire insurance, that no action against the insurers for the recovery of a claim should be sustained unless commenced within the time limited in such policy, (such time being sometimes twelve, sometimes six months, and sometimes ninety days) have been approved of and upheld by the Courts. Such question is no longer an open one in this Court.

Riddlesberger *v.* Hartford Ins. Co., 7 Wall, 386, and authorities there referred to.

b. In suits against Telegraph Companies, where there was contained on the blank on which the message was ordered to be sent, a printed condition, providing that the Company would not be held liable for damages if the claim was not presented in sixty days from the date of the message, the same doctrine has been held.

Wolf *v.* The Western Union Tel. Co., 62 Penn., 83.
Young *v.* The Western Union Tel. Co., 34 N. Y. Superior Court Rep., 390.

c. If it be conceded, as the demurrer to the plea concedes, and as is otherwise well settled law, that a common carrier can now make a special contract for the transportation of goods, it would seem that there could be no valid reason assigned why in such contracts, provisions which have been upheld by the Courts as reasonable and binding, when made with other parties, and with reference to other subject matter, should not be equally binding and equally upheld by the Courts, when made between a carrier and shipper.

But we are not even without authority on this point. In Lewis *v.* The Great Western Railway Company, (5 Hurl. & N., 867), the Court sustained a similar clause contained in the Bill of Lading, which provided that "no claim for deficiency, damage or detention will be allowed, unless made within three days after the delivery of the goods; nor for loss, unless made within seven days from the time they should have been delivered."

In Weir *v.* The Adams Express Company, decided by the District Court of the city and county of Philadelphia —January 4, 1864—unreported, a clause in the Bill of Lading virtually prescribing a Statute of Limitation of thirty days, was sustained by the Court, and the reason for so sustaining it is there tersely expressed by Sharswood, P. J.

The opinion being short and unreported, is here printed *in extenso*:

"The verdict here is not large, and we would be very glad not to disturb it. But we find this

impossible. It is a part of the contract, on which plaintiff sues, that the defendants shall not 'in any event be liable for any loss or damage, unless the claim therefor shall be presented to them in writing, at their said office, within thirty days after the time when said property has, or ought to have been delivered.' This is a very reasonable and proper provision to enable the defendants, while the matter is still fresh, to institute proper inquiries, and furnish themselves with evidence on the subject. The defendants do a large business, and to allow suits to be brought against them without such notice, at any length of time, would be to surrender them, bound hand and foot, to almost every claim which might be made. It would be next to impossible when a thousand packages, large and small, are forwarded by them daily, to ascertain anything about the loss of one of them at a distance of six months or a year. Now, as to the amount recovered, the verdict was obtained on the assumption that the property burned on the 25th May, 1862, ought to have been returned to plaintiff before that. No evidence was given of any claim on the defendants within thirty days after May 25th, 1862, or at any other time before suit brought. Rule discharged and judgment for defendants."

It is therefore respectfully submitted that the Court below erred in sustaining the demurrer to the special plea.

Point II.

As to the Second Assignment of Error:

The defendant in error introduced, as part of his case, the Express receipt. Without it there was no evidence of the amount of money delivered; for Caufman, the

person who delivered the package to the Express Company, distinctly swore: "I do not remember what was in the package, but do remember the receipt was satisfactory to me at the time" (fol. 26 of Record).

It must be remembered that the declaration is against the Express Company on their common law liability as carriers. In such a case can a recovery be upheld where the complaining party himself proves a special contract for the transportation of the goods? It is believed that it cannot, for it is well settled that a plaintiff declaring against a carrier on his common law liability cannot succeed, and must be non-suited, on proof that the carriage of the property was under and pursuant to a special contract.

a. When the special contract is proved, the shipper cannot rely on the common law liability of the carrier.

Mich. Central R. R. Co. *v.* Hale, 6 Mich., 243.

b. If the shipper ignores the contract and sues upon the common law liability, he will, on proof of the special contract, be non-suited.

Latham *v.* Rutley, 1 Law Jour.. K. B., 225.
Austin *v.* Manchester, &c., R. R. Co., 15 Jur., 670.
Davidson *v.* Graham, 2 Ohio, N. S., 131.
Ferguson *v.* Cappeau, 6 Harr. & Johns, 394.
Stump *v.* Hutchinson, 11 Penn., 533.

—and it will be error to leave the jury to say whether the defendants are or are not common carriers.

Y. N. & R. R. R. Co. *v.* Crisp, 14 Com. B., 527.

c. The only remedy of the shipper in case of loss is to sue for the breach of the special contract.

Shaw *v.* Y. & M. R. R. Co., 13 Q. B., 347.
Austin *v.* Manchester, &c., R. R. Co., *supra.*
Kimball *v.* Rutland, &c., R. R. Co., 26 Vermont, 247.

Now, does the record disclose that the defendant in error made a special contract with the plaintiff in error

for the conveyance and transportation of the package in question? That it does is hardly open to question; for—

a. The witness Caufman, the agent of the plaintiff, who delivered it, testified that "the receipt was satisfactory to me at the time." * * * "When I took the receipt I either read it myself or heard it read, I do not know which. I carried the receipt back, and gave it to the plaintiff" (fol. 26 of Record).

b. The plaintiff kept such receipt, and introduced it in evidence as part of his *prima facie* case (fols. 26 and 6 and 7 of Record).

c. There was no other proof of the delivery of the contents of the package save by such receipt; for the witness Caufman had testified that "I do not remember what was in the package, but do remember the receipt was satisfactory to me at the time" (fol. 26 of Record).

From the law applicable to these facts of the case it would result—

a. That the execution of the Express receipt by the agent of the plaintiff in error, and its acceptance by the defendant in error without objection, when the package of money was delivered into the custody of the plaintiff in error, constituted *the contract* between the parties; and the plaintiff in error must be regarded as undertaking, and the defendant in error as agreeing, that the money package was to be carried upon the conditions expressed in said agreement.

N. J. S. N. Co. *v.* Merchants' Bank, 6 How., 344.
N. Y. Manufg. Co. *v.* Ill. Cent. R. Co., 3 Wall., 107.
Hopkins *v.* Wescott, 6 Blatch., U. S. C. C. R,, 64.
Dorr *v.* N. J. S. N. Co. 1 Kern, 485.
French *v.* B., N. Y. & E. R. R. Co., 4 Keyes, 108.
Guillaume *v.* Hamburg & Am. Packet Co., 42 N. Y. 212.

Maghee *v.* Camden & Amboy R. R. Co., 45 N. Y. 514, 518.
Lamb *v.* Camden & Amboy R. R. Co., 46 N. Y., 271.
Cochran *v.* Dinsmore, 49 N. Y., 249.
Long *v.* N. Y. Cent. R. R. Co., 50 N. Y., 76.
Belger *v.* Dinsmore, 51 N. Y., 166.
Collender *v.* Dinsmore, 55 N. Y., 200.
Magnin *v.* Dinsmore, 56 N. Y.
(as yet unreported, in which case the Court of Appeals of the State of New York said: "For it is no longer open to question, in this State, that, in the absence of fraud or imposition, the rights of carrier and shipper are controlled by a contract in writing delivered to the shipper by the carrier at the time of the receipt of the property for transportation.")
Squire *v.* N. Y. C. R. R. Co., 98 Mass, 239.
Perry *v.* Thompson, *Ibid*, 248.
Grace *v.* Adams Express Co., 100 Mass., 505.
Pendergast *v.* Adams Express Co., 101 Mass., 120.
Lawrence *v.* N. Y. P. & B. R. R. Co., 36 Conn., 63.
Kalman *v.* U. S. Express Co., 3 Kansas, 205.
Boorman *v.* Am. Express Co., 21 Wis., 153.
Oppenheimer *v.* U. S. Express Co., Ill. Supreme Court of Illinois, reported in full in 9 Alb. L. J., 187.
Lewis *v.* Gt. Western Co, 5 H. & N., 867.
Van Toll *v.* S. E. R. R. Co., 12 C. B., N. S. (104 Eng. Com. Law, 73.)

And similar doctrine has been applied—

To the conditions printed at the head of a telegraphic blank.

Breese *v.* U. S. Telegraph Co., 48 N. Y., 132.
Young *v.* Western Union Tel. Co., 34 N. Y. Superior Court Rep. 390.
Wolf *v.* Western Union Tel. Co., 62 Penn., 83.
McAndrews *v.* Electric Tel. Co., 17 C. B., 3.
2 American Law Review, where the authorities are collected.

b. Nor can it be successfully urged that the case of *The R. R. Co.* v. *The Manufacturing Co.*, decided by this Court (16 *Wall.*, 318) is applicable to the case at bar. For—

1. In that case the condition was printed on the back of the receipt; and

informed of, or knew, the contents of the limitation so printed on the back.

Whereas, in the case at bar, it appears—

1. That the limitations contained in the receipt were printed on its face (fols. 6 and 7 of Record); and
2. That the receipt was satisfactory to, and read, or heard read by the witness Caufman, who, as agent of the shippers, delivered the package to the Express Company—the language of the witness being—"the receipt was satisfactory to me at the time." * * * When I took the receipt I either read it myself or heard it read, I do not know which. I carried the receipt back, and gave it to the plaintiff" (fol. 26 of Record).

c. It is true that the defendant in error did not himself deliver the package in question to the plaintiff in error, but it was delivered by an agent of the plaintiff; and, so far as the plaintiff in error was concerned, such agent must be considered as either the owner of the package, or as the agent duly authorized to make the contract of shipment.

In *York Co.* v. *The C. R. R. Co.* (3 *Wall.*, 107) the same objection was taken to the right of the agent who made the shipment; but Mr. Justice Field, in delivering the opinion of this Court, there said (p. 113): "The first of these positions is answered by the fact that it nowhere appears that the agents disclosed their agency when contracting for the transportation of the cotton. So far as the defendant could see, they were themselves the owners."

In *Dorr* v. *The N. J. S. N. Co.* (1 *Kern.*, 484) the Bill of Lading containing the exceptions

was delivered to the carman of the plaintiff, and yet the Court held that it was binding upon the plaintiff, saying (p. 491): "For the exceptions to the common law liability being made in the Bill of Lading, and delivered to the agent of the plaintiff, must be deemed to have been agreed upon by the parties."

To the same effect was the language of GIBSON, *J.*, in *Griffith* v. *Ingledew* (6 *Sergeant & Rawle*, 429, 437), where that learned Judge said: "Where goods are delivered to a carrier, pursuant to an order of a vendee, who has not himself settled the terms, the vendor, where he makes a special agreement with the carrier without expressly making himself liable, will be considered as having contracted as the agent, and in behalf of the vendee."

The decision of the Commission of Appeals of the State of New York in *Nelson* v. *The Hudson River R. R. Co.* (48 *N. Y.*, 498), enunciated similar doctrine. Mr. Justice HUNT, in delivering the opinion, said: "Kimball & Co. were authorized then to carry this mirror to the starting point of the Hudson River Road, and to procure its acceptance by that Road for the purpose of being transported to Fulton. This authority must be construed to include all the necessary and usual means of carrying it into effect."

And then the learned Justice cited with approval the rule as laid down by *Redfield on the Law of Railways*, *p.* 22, which is as follows:

"As a general rule, the agent to whom the owner entrusts the goods for delivery must be regarded as having authority to stipulate for the terms of transportation."

See, also, the opinion of Mr. Justice EARLE in the same case, and the authorities there cited, especially the case of *Squire* v. *The N. Y, Cent. R. R. Co.* (98 *Mass.*, 239), where Mr.

> Justice GRAY, in delivering the opinion of the Court, said: "That even if the drover had no express authority from the plaintiffs to sign any contract relating to their [hogs] transportation, he was the person in charge of the property, and the only one with whom the defendants could make the necessary arrangements, and stood toward them for this purpose in the position of an owner."

It would seem to follow, therefore, that the Court below erred in denying the motion for a new trial on the grounds so made, viz., that the verdict was without evidence to support it, and was contrary to the evidence.

Nor can it be properly urged in opposition that no exception appears to have been taken to the charge of the Court to the jury; for if, as matter of law, the plaintiff ought not to have recovered on the evidence, the motion for a new trial ought to have been granted, whether there was an exception to the charge or not.

Rich *v.* Penfield, 1 Wendell, 380, 387.
Archer *v.* Hubbell, 4 *Id.*, 514.

Point III.

The judgment of the Court below shouldbe revers ed.

C. A. SEWARD,
Of Counsel for Plaintiff in Error.

December, 1874.

Supreme Court of the United States.

No. 115.

The Southern Express Company,

PLAINTIFF IN ERROR.

VS.

Robert D. Caldwell,

DEFENDANT

BRIEF FOR DEFENDANT IN ERROR.

SAM'L R. BOND, WASHINGTON, D. C. } *Counsel.*

WASHINGTON:
GIBSON BROTHERS, PRINTERS.
1874.

In the Supreme Court of the United States.

October Term, 1874.

THE SOUTHERN EXPRESS COMPANY,
PLAINTIFF IN ERROR,

vs.

ROBERT D. CALDWELL.

No. 115.

Brief for Defendant in Error.

STATEMENT.

This suit was brought September, 1867, by Robert D. Caldwell against the Southern Express Company in the State court, and removed by the defendant below to the circuit court of the United States for the district of West Tennessee. The amended declaration upon which the cause was tried (p. 9 of record) sets forth in substance that, on the 23d of April, 1862, at Jackson, Tenn., the plaintiff delivered to the defendant, a corporation by virtue of the laws of Georgia, and a common carrier of goods, chattels, moneys, and other valuables for hire, the sum of $2,160, which the defendant, for a reward paid, undertook and faithfully promised to safely and securely carry and deliver for the plaintiff to Messrs. Wilson & Young, at New Orleans; that it did not deliver said money, but that the same was lost to the plaintiff through the mere carelessness

and negligence and improper conduct of the defendant, its agents, and servants. To this declaration the defendant pleads that when it received the said package to carry and deliver as alleged it was agreed between the said company and plaintiff that it should not be liable for any loss of, or damage to, said package, unless claim therefor should be made within ninety days from its delivery to said company; that the said package was lost in 1862, but no claim was made for such loss upon defendant until the bringing of this suit, (p. 8 of record.) To this plea the plaintiff demurred, (p. 9 of record,) assigning as grounds of demurrer that by said plea the defendant attempts to evade the responsibility by an illegal stipulation, which the policy of the law does not allow; and because the plea does not deny that the loss was by reason of the gross negligence of its agents. The demurrer was sustained, and a trial was had upon the issues joined upon the other pleas: that the company delivered the package according to its undertaking; that it did not receive said package, and the general issue, (pp. 2 and 8 of record,) and a verdict was returned for the plaintiff. No exceptions were taken by the defendant on the trial, either to the admission or rejection of evidence, or to the charge of the court; and the only alleged error upon which the cause is brought here is the action of the court in sustaining the demurrer.

POINTS AND AUTHORITIES.

The single question before this court is whether the express company, a common carrier, is exempted from liability for the loss, which is admitted by the plea to have been caused through the mere carelessness and negligence and improper conduct of itself, its agents, and servants, by force of the agreement set up in the plea demurred to, that it should not be liable for any loss or damage unless claim

therefor should be made within ninety days from the delivery of the package to the company.

I.

That a common carrier cannot, even by express contract, limit its liability for loss occasioned by its own negligence, has been so explicitly and so recently decided by this court as to render unnecessary and out of place any new discussion of the question, or even a collation of the able and numerous decisions throughout the country to the same effect.

This principle was decided in the case of the New Jersey Steam Navigation Company *vs.* Merchants' Bank.

6 How., S. C. R., 344.

It was adhered to in the case of the N. Y. Central R.R. Co. *vs.* Lockwood, decided at the October term, 1873, of this court, which will appear in 19 Wall. R.

In that case Mr. Justice Bradley, who delivered the opinion of the court, discusses most ably and elaborately the power of a common carrier so to limit its liability, and reviews, *in extenso*, the decisions, both in England and in this country, on the subject, holding clearly and distinctly—

1. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

2. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

The reports abound in decisions of the State courts establishing these principles unequivocally, many of which are cited by Mr. Justice Bradley in the case above referred to.

In the case at bar the plea admits that the loss was

caused by the "carelessness and negligence and improper conduct of the defendant, its agents, and servants," and seeks to avoid liability for the loss by force of the alleged agreement. That the demurrer was rightly sustained follows from the decisons of this court above cited.

The common-law liability of common carriers is absolute for all loss or damage, except that which is occasioned by act of God or the public enemy. They are insurers, and it is the liability as insurers which the courts have gradually allowed to be limited by express agreement. But they remain common carriers still. The nature of their employment is not changed, nor are the necessities of the public to trust to their keeping both life and property any the less. The carrier in this case is a corporation, with chartered privileges, and it must be held to corresponding duties and liabilities to the public.

It is well said in Redfield on Railroads, (p. 272, sec. 5:) "There is something very incongruous and not a little revolting to the moral sense that a bailee should be allowed to stipulate for exemption from the consequences of his own negligence, ordinary or extraordinary."

In the case of the Mobile and Ohio R. Co. *vs.* Hopkins, (41 Ala. R., 486,) Hopkins, the plaintiff below, had a free pass, providing that in consideration of its acceptance he "assumes all risk of accident, and expressly agrees that the company shall not be liable under any circumstances, whether of the negligence of their agents or otherwise, for any injury to the person or property." The baggage check which he received also contained the stipulation that "in consideration of free carriage its value is agreed to be limited to $100." The baggage being lost, the suit was brought to recover its value, alleged to be $1,500. The declaration was similar to that in the case at bar, and the company pleaded the express agreement to

avoid or limit its liability. A demurrer to the plea was sustained, a trial had, and a verdict rendered for the plaintiff, and sustained by the court above, which held that the company, even by express contract, could not limit its liability for loss by negligence, but only the extraordinary liability by which at common law it would be held as an insurer.

II.

It is an accepted principle that in reviewing a case in error the court will look through the whole record, and if it appears therefrom that the final judgment below was correct, it will not be reversed. (Powell on Appellate Proceedings, §§ 113 and 131.) And although in the present case the defendant in error can safely rely upon the proposition above stated, yet an examination of the record will enlighten the court as to the nature of the alleged contract by which the company seeks to limit its liability. It is simply a stipulation in the receipt which was given by the company at the time of the delivery of the money to it. (P. 3 of Record.) It requires the concurrence of both parties to constitute a contract, with full knowledge and upon sufficient consideration. The carrier is bound to perform the service upon being paid therefor, and it is a dangerous policy to allow it to exonerate itself, even from its full liability, at common law, by any artifice, to the injury of those who are, in the ordinary course of business, compelled to employ its services.

Fillebrown *vs.* G. T. R. Co., 55 Me. R., 462, and cases cited.

In Blossom *vs.* Dodd, (43 N. Y. R., 264,) a receipt was given for baggage, containing the stipulation that the defendant, an express company, would not be liable beyond

a specified value, and that "it is further agreed that said express shall not be liable for loss or damage, unless the claim therefor be made in writing at their principal office, with the receipt annexed, within thirty days thereafter." This was held, Church, J., delivering the opinion of the court, not to constitute a contract on the part of the plaintiff.

In the Southern Express Co. *vs.* Moon, (39 Miss. R., 822,) the same rule was held in regard to the limitations contained in a receipt.

In Orndorff & Co. *vs.* Adams Express Co., 3 Bush (Ky.) R., 194, the court doubted whether the stipulation in a receipt limiting the value of the article to be transported amounted to a contract, and held clearly that to allow such a limitation in cases of neglect and conversion would recognize the right of common carriers "to convert other people's property to their own use at their own price."

In Jones *vs.* Voorhees, (10 Ohio R., 145,) the court ably discusses the law on this subject in England and this country, and alludes approvingly to the return in the former to the salutary rules from which the courts for a time departed.

III.

There can be no just distinction between an attempted limitation of time and one as to the amount or extent of liability. The case of the Southern Express Co. *vs.* Caperton, (44 Ala. R., 101,) is in all essential respects the same as the one at bar, except that the declaration did not charge negligence, but simply the delivery of the money to the company and its loss. There this same express company gave a receipt for a package of money containing the same stipulation exempting it from liability unless claim for the

loss was made within a certain number of days from its delivery to the company. The court held that such a stipulation is "unreasonable and tends to fraud, and is inoperative," and that "he cannot be allowed to make a statute of limitations so short as to be capable of becoming a means of fraud," and cites other cases in that State to the same effect. Precisely similar is the case of the Southern Express Co. *vs.* Barnes, (36 Ga. R., 532;) also, Blossom *vs.* Dodd, above cited.

IV.

This court has held that it will judicially notice public facts and geographical positions relative to cases before it.

Apollon, 9 Wheat., 374.
U. S. *vs.* La Vengeance, 3 Dallas, 297.
Steamboat Jefferson, 10 Wheat., 428.
Peyroux *vs.* Howard, 7 Peters, 342.

This principle will bring to the notice of the court the public fact that but a few days after the delivery of the money to the company (April 23, 1862,) New Orleans was captured by the Union forces, which entered into full occupation on May 1, 1862, whereby intercourse or communication between that city and Jackson, Tenn., where the money was delivered and near where the consignor resided, was cut off, and that this condition of things continued until long after the limitation of ninety days expired, rendering it almost impossible for the defendant in error to know that the consignee had not received the remittance.

In Semmes *vs.* Hartford Insurance Co., (13 Wall. R. 158,) the court took notice of the period of the war, and held that the disability imposed upon the plaintiff thereby relieved him from the consequences of failing to bring suit

within the time limited by the terms of an insurance policy, and that the contract limitation became inoperative and only the statutory limitation remained in force, with the period of the war excluded. It is claimed that this principle would apply to the present case were there any need of its application.

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